ARTICLES

BUSH v. GORE WAS NOT JUSTICIABLE

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INTRODUCTION

On December 12, 2000, for the first time in American history, the Supreme Court decided who would be the next President of the United States. In *Bush v. Gore*,[1] the Supreme Court concluded that it violated equal protection to count the uncounted votes in Florida without clear, uniform standards.[2] The Court said that the case could not be remanded to the Florida courts, because Florida law required that the counting be completed by December 12, 2000 to meet the "safe harbor provision" created by federal law.[3]

Bush v. Gore was a 5–4 decision, with the Justices split entirely along ideological lines.[4] The per curiam opinion was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas; the dissenters were Justices Stevens, Souter, Ginsburg, and Breyer.[5] A large segment of the American people—certainly the ma-

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1 121 S. Ct. 525 (2000).

2 *See id.* at 529, 532–33.

3 *See* 3 U.S.C. § 5 (1994); *Bush*, 121 S. Ct. at 533.

4 In the aftermath of *Bush v. Gore*, some commentators suggested that it really was a 7–2 decision. *See* Michael W. McConnell, *A Muddled Ruling*, WALL ST. J., Dec. 14, 2000, at A26. It was not. Two of the dissenting Justices, Breyer and Souter, agreed that there were equal protection problems with counting votes without uniform standards. *See Bush*, 121 S. Ct. at 545 (Souter, J., dissenting); *id.* at 551 (Breyer, J., dissenting). However, their opinions were expressly labeled as dissents. They could have "concurred in part and dissented in part," but did not. Moreover, the key difference between the majority and the dissents was whether the counting should be halted or continued. The five Justices in the majority voted to end the counting; the four dissenting Justices would have allowed it to continue. The case was clearly and obviously a 5–4 ruling.

5 Also, a concurring opinion was written by Chief Justice Rehnquist that was joined by Justices Scalia and Thomas. It argued that counting the votes in Florida

jority of citizens who voted for Al Gore—regard the ruling as a partisan decision where five conservative Republican Justices handed the election to the Republican candidate, George W. Bush.

Bush v. Gore obviously attracted enormous public and media attention. Yet, one crucial aspect of the case was largely overlooked: justiciability. For all of the discussion about the decision, no one seemed to pay much attention to whether the Court properly had the legal authority to hear the case. Most likely, this is because justiciability doctrines are complicated and unfamiliar to the public. Perhaps, too, this is because neither of the parties raised justiciability issues in their briefs. This, however, does not excuse the Court's failure to raise it, because it is firmly established that justiciability issues are jurisdictional, and courts are to raise them even if the parties do not.[6]

In this Article, I argue that *Bush v. Gore* was not justiciable and that the Supreme Court should have dismissed the case on these grounds. Part I argues that George W. Bush lacked standing to raise the claims of Florida voters that they were denied equal protection by the counting of votes without standards. Bush's argument was based entirely on discrimination among voters in Florida as a result of the counting of ballots without standards. But he personally did not suffer this injury, and he did not have standing to raise the rights of the Florida voters.

Part II contends that the case was not ripe for review, because the counting had not yet occurred. Quite possibly, the Florida trial judge overseeing the counting might have eliminated disparities. Also, it is possible that Bush would have been ahead at the end of all of the counting. Phrased another way, Bush's claim was an "as applied" challenge, not a facial challenge to Florida law. Yet, the Supreme Court decided the case before the Florida law was applied and thus before the case was ripe.

Part III argues that the case was a political question. The Court should have left the dispute to be resolved by Congress. In another voting context, the Supreme Court spoke expressly of "the large public interest in allowing the political processes to function free from judicial supervision . . . ."[7]

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under the Florida Supreme Court's decision was an impermissible change in the law in violation of 3 U.S.C. § 5. *Bush*, 121 S. Ct. at 533 (Rehnquist, C.J., concurring).

6 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750–52 (1984); Warth v. Seldin, 422 U.S. 490, 498 (1975).

7 O'Brien v. Brown, 409 U.S. 1, 5 (1972); *see infra* text accompanying notes 92–101.

Part IV contends that at the very least, the Court should have let Florida courts decide whether Florida law prevented the counting from continuing. Ultimately, the Supreme Court ended the counting entirely based on its conclusion that Florida law required the completion of the process by December 12. Yet, no Florida statute says this and the Florida Supreme Court never had decided whether, faced with the December 12 deadline, Florida law required that the counting continue or cease. It should have been for the Florida Supreme Court to interpret Florida law. This is a further reason why the case should have been dismissed as non-justiciable.

In his dissent, Justice Breyer refers to the case as a "self-inflicted wound,"[8] the phrase used to describe the Court's infamous ruling in *Dred Scott v. Sandford*.[9] Justice Breyer concluded his dissent by stating:

> I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary "check upon our own exercise of power," "our own sense of self-restraint." Justice Brandeis once said of the Court, "The most important thing we do is not doing." What it does today, the Court should have left undone.[10]

This Article argues that Justice Breyer was right.

I. STANDING

Procedurally, *Bush v. Gore* came to the Supreme Court on a petition for a writ of certiorari brought by George W. Bush seeking review of the Florida Supreme Court's decision. After Florida Secretary of State Katherine Harris certified George W. Bush as the victor in Florida on Sunday, November 26, Al Gore filed a contest under Florida law.[11] A Florida trial court judge in Leon County, Florida held a hearing and concluded on December 4, 2000 in favor of Bush.[12] The judge ruled that Gore needed to prove a probability that he would prevail if a recount were held and that Gore failed to prove this.[13]

The Florida Supreme Court immediately granted review, held a hearing on December 7, and on December 8 reversed the Florida trial court's decision not to conduct a recount.[14] The Florida Supreme

8 *Bush*, 121 S. Ct. at 557 (Breyer, J., dissenting).

9 60 U.S. (19 How.) 393 (1856); *see* CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS, AN INTERPRETATION 50 (1928).

10 *Bush*, 121 S. Ct. at 557–58 (Breyer, J., dissenting) (citations omitted).

11 *See* FLA. STAT. ANN. § 102.166 (West 1982); *Bush*, 121 S. Ct. at 528.

12 *See Bush*, 121 S. Ct. at 528.

13 *See id.*

14 *See id.* at 527–29.

Court ruled that the trial court applied the wrong legal standard.[15] Florida law states that a candidate can contest an election by demonstrating "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election."[16] The Florida Supreme Court ruled that Gore met this burden; the closeness of the election and the existence of many ballots that the machines did not count were sufficient to "place the results of this election in doubt."[17] The Florida Supreme Court ordered the counting to begin immediately across the state.[18] Pursuant to this order, the counting began first thing the next morning, Saturday, and the trial judge expected that the counting could be completed by 2:00 p.m. on the next day, Sunday.[19]

Bush immediately sought Supreme Court review of the Florida Supreme Court's decision. On Saturday afternoon, December 9, the Supreme Court stayed the counting in Florida, granted review, and scheduled oral arguments for Monday, December 11.[20] In other words, the case came to the Supreme Court on a petition for a writ of

15 *See id.*

16 FLA. STAT. ANN. § 102.168(3)(c) (West 1982 & Supp. 2001).

17 *Bush*, 121 S. Ct. at 528.

18 *See* Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000).

19 Dan Balz, *Fla. Supreme Court Orders Partial Recount Across State, Bush Appeals to U.S. High Court as Ruling Cuts Lead to 154 Votes*, WASH. POST, Dec. 9, 2000, at A1, A15.

20 *See* Bush v. Gore, 121 S. Ct. 512, 512 (2000). Apart from the justiciability issues discussed in this Article, the Supreme Court's grant of a stay was wrong. The Court can stay a lower court ruling only if there is an irreparable injury that will occur without a stay. But there was no irreparable injury to allowing the counting to continue pending the Supreme Court's hearing and deciding the case. Justice Scalia wrote an opinion arguing that there was irreparable injury justifying the stay. *See id.* at 512. Scalia gave two reasons.

First, allowing the counting to continue could undermine the "legitimacy" of the Bush presidency if the count showed Gore the winner and the Supreme Court disallowed the count. *See id.* But this is speculative; it could not be known whether the count would put Bush or Gore on top, and it could not be known how the American public would react if Gore was ahead and the Court disallowed the counting. Moreover, the Court's stopping the counting also undermined the legitimacy of the Bush presidency. If legitimacy is an appropriate judicial concern, then the Court's preventing the votes from being counted hurt both the legitimacy of the presidency and of the Court. But all of this assumes that the Court should be concerned with the public's perception of the election and that any adverse perceptions constitute irreparable injury.

Second, Justice Scalia said that handling the ballots causes their degradation and could prevent a more accurate recount later. *See id.* However, there was no evidence in the record to support this claim. Also, the argument is disingenuous; the Court stopped the counting to preserve a later count that never could occur. In *Bush v. Gore*, the Court said that Florida law set a December 12 deadline for counting. The

certiorari by the defendant in the lawsuit, George W. Bush. Bush's central claim was that counting of ballots without uniform standards violated equal protection.[21]

But did Bush have standing to raise this claim? The Supreme Court long has said that the requirement for standing is based on Article III's limiting the federal courts to deciding "cases" and "controversies."[22] Standing is thus jurisdictional, and courts must raise it on their own even if it is not challenged by the parties. Standing is the determination of whether a specific person is the proper party to bring a matter to the court for adjudication. The Supreme Court has declared that "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[23]

In no way was Bush treated any differently from Gore during the counting process. There was no reason to believe that the counting procedure would treat ballots for Bush any differently from ballots for Gore. Nor did Bush contend that he was treated unequally in the counting process. In other words, Bush was not claiming that he was being discriminated against in the counting of the uncounted votes. The equal protection issue was not discrimination between Bush and Gore, but rather discrimination among ballots. The only equal protection claim was that a voter's ballot might be disallowed while an identical ballot would be counted. This claim made it irrelevant whether both ballots were for the same candidate or if they were for different candidates; the argument was that to treat two similar ballots differently denied equal protection to the voter whose ballot was disallowed.

The Supreme Court has declared that the "irreducible minimum" of Article III's limit on judicial power is a requirement that a party "show that he personally has suffered some actual or threatened injury . . . ."[24] George W. Bush did not and could not claim that he was denied equal protection. The Florida Supreme Court did not discrim-

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Supreme Court knew, on December 9, that stopping the count effectively decided the election.

There was no irreparable injury to allowing the counting to continue. But Al Gore obviously suffered irreversible injury by halting the counting.

21 *See* Brief for Petitioners at 18, 40–45, Bush v. Gore, 121 S. Ct. 525 (2000) (No. 00-949).

22 *See, e.g.*, Warth v. Seldon, 422 U.S. 490, 498 (1975).

23 *Warth*, 422 U.S. at 498.

24 Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (quoting Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 99 (1979)).

inate against him in any way or treat him differently from Al Gore. Bush did not have standing to raise an equal protection claim, because he did not "personally suffer" any discrimination.

The Supreme Court has expressly applied standing in the election context. In *United States v. Hays*,[25] the Court held that only a person residing within an election district may argue that the lines for the district were unconstitutionally drawn in violation of equal protection.[26] The Supreme Court has held that the government may use race in drawing election district lines only if it meets strict scrutiny, even if the purpose is to increase the likelihood of electing minority-race representatives.[27] In *Hays*, the Court held that only individuals residing within a district suffer an injury from how the lines for that district are drawn. The Court said that a "plaintiff [who] resides in a racially gerrymandered district . . . has standing to challenge the legislature's action,"[28] but a plaintiff who resides outside the district fails to suffer "the injury our standing doctrine requires."[29]

Bush v. Gore is directly analogous. In *Hays*, the Court said that a plaintiff who resided outside the voting district could not raise the claims of other voters who resided within the district; yet, that is exactly what George W. Bush did. As in *Hays*, there was not standing in *Bush v. Gore*.

Several arguments might be made in support of Bush having standing to raise the equal protection issue. First, Bush could claim that he was injured by the counting of the ballots; they could lead to his losing in Florida and thus the presidential election. As discussed in Part III, there is a serious problem with this argument from a ripeness perspective; the counting had not yet occurred, so it was speculative as to whether this injury would occur. Also, Bush's injury of not winning the presidency was distinct from the injury to the voters in having their ballots counted unequally. Because Bush did not vote in Florida he could not present this injury. Plaintiffs only have standing

25 515 U.S. 737 (1995).

26 *Id.* at 745. The Court reaffirmed and applied this limitation on standing to challenge election districts in *Shaw v. Hunt*, 517 U.S. 899, 904–05 (1996), and *Bush v. Vera*, 517 U.S. 952, 957–58 (1996) (plurality opinion).

27 *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 920 (1995); Shaw v. Reno, 509 U.S. 630, 644 (1993).

28 *Hays*, 515 U.S. at 744–45.

29 *Id.* at 747. Although the Court expressly said that the injury requirement was not met, the Court also said that the case presented a "generalized grievance." *Id.* at 745. This raises the question of whether the Court continues to believe that the generalized grievance requirement is a separate standing rule or simply another way of saying that there is not an injury sufficient for standing purposes.

to present the injuries that they personally suffer.[30] As the Supreme Court declared, "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[31]

Again, an analogy can be drawn to *Hays*, where the Court held that only voters within a district can challenge how its election districts are drawn. A voter residing in a contiguous district, who claims to have been excluded because of the race-based districting, could claim to be injured.[32] Drawing lines for one election district inevitably affects the lines for neighboring districts. But the Supreme Court expressly rejected this argument and said that voters in one district, even though they were affected, could not raise the claims of other voters.[33] By analogy, Bush's injury in perhaps losing the presidency did not accord him standing to raise the claims of Florida voters whose ballots were claimed to be counted unequally.

Second, it can be argued that Bush had third-party standing to raise the rights of Florida voters. This is the strongest claim for standing in *Bush v. Gore*. Generally, third-party standing is not allowed; plaintiffs only have standing to raise their own claims and cannot present the injuries suffered by third parties not before the Court.[34] There are, however, exceptions where third-party standing is permitted.

For example, a person may assert the rights of a third party not before the court if there are substantial obstacles to the third party asserting his or her own rights, and if there is reason to believe that the advocate will effectively represent the interests of the third party.[35] *Barrows v. Jackson*[36] is the most famous example of this and the case

30 *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

31 Warth v. Seldin, 422 U.S. 490, 499 (1975); *see also* United Food and Commercial Workers Union Local 751 v. Brown Group, 517 U.S. 544, 557 (1996) (discussing the bar against third-party standing as prudential).

32 *But see* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245 (arguing that even voters who live in majority-minority districts should not have standing).

33 *Hays*, 515 U.S. at 747; *see supra* text accompanying notes 25–29.

34 *See* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 278 n.6 (1984) (defining jus tertii standing); *see also* Robert Allen Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CAL. L. REV. 1308, 1315–19 (1982) (arguing that the Court is wrong to consider constitutional jus tertii in terms of standing).

35 *See* Sec'y of State v. J.H. Munson Co., 467 U.S. 947, 956 (1984).

36 346 U.S. 249 (1953).

most closely analogous to *Bush v. Gore.* In *Barrows,* the Court allowed third-party standing and permitted an individual sued for breaching a racially restrictive covenant to assert the rights of blacks in the community.[37] Barrows, a white person who had signed a racially restrictive covenant, was sued for breach of contract for allowing nonwhites to occupy the property.[38] The defense was based on the rights of blacks, who were not parties to the lawsuit, for breach of contract.[39] The Court allowed third-party standing, permitting the white defendant to raise the interests of blacks to rent and own property in the community.[40] The Court stated that "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court."[41] Because blacks were not parties to the covenant, they had no legal basis for participating in the breach of contract suit.

Bush, like the party raising the discrimination claim in *Barrows,* was the defendant raising the claims of third parties. Bush can argue that, like in *Barrows,* the injured third parties were not part of the litigation. But there the analogy stops. The key difference is that in *Barrows* the victims of discrimination likely had no basis for their own lawsuit. *Barrows* was litigated in the early 1950s, before open housing laws were enacted. In *Bush,* there is no reason why Florida voters could not bring their own claim, either in a separate action or by intervening in the on-going litigation. This exception to the prohibition of third-party standing requires that the injured third party be unlikely to protect its own rights, and that was not present here.

In response to this, it could be argued that no Florida voter could know if it is his or her ballot that is going uncounted; thus no Florida voter can meet the requirements for standing. But the Supreme Court long has said that the absence of a plaintiff for standing indicates that the matter is left to the political process and not to the courts. In *United States v. Richardson,*[42] the plaintiff claimed that the statutes providing for the secrecy of the Central Intelligence Agency budget violated the Constitution's requirement for a regular statement and accounting of all expenditures.[43] The Court ruled that the plaintiff lacked standing because his case presented a generalized grievance;[44] the plaintiff did not allege a violation of a personal consti-

37 *See id.* at 257.
38 *See id.* at 254–55.
39 *See id.*
40 *See id.* at 257.
41 *Id.*
42 418 U.S. 166 (1974).
43 *See id.* at 167–69.
44 *See id.* at 170.

tutional right, but instead claimed injury only as a citizen and taxpayer.[45] The Court deemed irrelevant the plaintiff's claim that if he could not sue, no one could. The Court stated:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.[46]

A second exception to the ban against third-party standing permits an individual to assert the rights of third parties where there is a close relationship between the advocate and the third party. For example, doctors often have been accorded standing to raise the rights of their patients in challenging laws limiting the patients' access to contraceptives and abortions. In *Singleton v. Wulff*,[47] two physicians were accorded standing to challenge a state statute that prohibited the use of state Medicaid benefits to pay for nontherapeutic abortions (abortions that were not necessary to protect the health or life of the mother).[48]

It is difficult to fit *Bush v. Gore* within this exception. There is no personal relationship between Bush and the Florida voters. The Court has used this exception only in the circumstances in which there is both such a relationship and an interrelationship of the rights involved. In *Pierce v. Society of Sisters*,[49] a parochial school was accorded standing to challenge an Oregon law requiring all children to attend public school.[50] In *Craig v. Boren*,[51] the Court allowed bartenders to raise the claims of their customers in challenging an Oklahoma law that allowed women, but not men, to buy 3.2% beer at age eighteen.[52] These cases all involve a very different kind of relationship than that in *Bush v. Gore*.

At the very least, the Supreme Court should have addressed standing and explained why it accorded Bush standing to raise the claims of Florida voters. For decades, the Supreme Court has stressed the importance of standing as a constitutional requirement. The Su-

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45 *Id.* at 169, 175.

46 *Id.* at 179.

47 428 U.S. 106 (1976).

48 *See id.* at 118. *But see* Tileston v. Ullman, 318 U.S. 44, 46 (1943) (denying standing to doctor to raise challenges to law prohibiting use of contraceptives on behalf of patients).

49 268 U.S. 510 (1925).

50 *See id.* at 535–36.

51 429 U.S. 190 (1976).

52 *See id.* at 192–94.

preme Court has said that standing "is founded in concern about the proper—and properly limited role—of the courts in a democratic society."[53] In *Bush v. Gore*, the Court ignored these limits.

II. RIPENESS

The ripeness doctrine seeks to separate matters that are premature for review, because the injury is speculative and never may occur, from those cases that are appropriate for federal court action.[54] Ripeness, like standing, is based on Article III's requirement for cases and controversies.[55] Even if it is accepted that George W. Bush had standing to raise the claims of Florida voters, there is a distinct issue as to whether this claim was ripe for review.

For several reasons, the issues before the Supreme Court in *Bush v. Gore* were not ripe for review. The central issue was whether the counting of votes would deny equal protection. A constitutional violation would arise only if similar ballots were treated differently in the counting process; but it could not be known if this would happen until all votes were counted and the trial judge in Florida, Judge Lewis, ruled on all of the challenges. Until then, it was purely speculative as to whether there would be a problem with similar ballots being treated differently.

The Supreme Court, in its per curiam opinion, focused on inequalities that already had occurred. The opinion points to differences in the Miami-Dade and Palm Beach counting.[56] However, the counting that already had been done was not the issue before the Supreme Court.[57] The only issue was whether the counting should continue.[58] The prior experience was not predictive of what was to occur because

53 Warth v. Seldin, 422 U.S. 490, 498 (1975).

54 *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967).

55 *See, e.g.*, O'Shea v. Littleton, 414 U.S. 488, 493 (1974) (dismissing as not ripe a suit contending that the defendants, a magistrate and a judge, discriminated against blacks in setting bail and imposing sentences).

56 *See* Bush v. Gore, 121 S. Ct. 525, 527 (2000).

57 At one point, the per curiam opinion argues that the past inequalities were relevant. The Court stated: "That brings the analysis to yet a further equal protection problem. The votes certified by the court included a partial total from one county, Miami-Dade. The Florida Supreme Court's decision thus gives no assurance that the recounts included in a final certification must be complete." *Id.* at 531–32. But even the Supreme Court's phrasing acknowledges that it was speculative as to whether there would be incompleteness by the time the counting was finished. The existence and extent of this incompleteness could not be known when the Supreme Court decided the case on December 12, precisely because the Court had stayed the counting process.

58 *See id.* at 532–33.

of a key change: a single judge was overseeing the counting under the Florida Supreme Court's decision.[59] This judge was to hear all of the disputes and potentially could eliminate any inequalities by applying a uniform standard.[60]

Justice Stevens emphasized exactly this point in his dissent. He wrote: "Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process."[61]

Justice Stevens, however, did not draw a key conclusion from his observation: the challenge to the counting was not ripe for review. Only after the counting was completed could the parties claim that there was inequality and thus a constitutional violation.

Phrased another way, the Supreme Court improperly treated an "as applied" equal protection challenge as if it were a facial challenge. Bush was not arguing that the Florida election law was unconstitutional on its face. Neither in the briefs nor in the oral argument did Bush's lawyers suggest such a facial attack. Rather, Bush's argument was that counting without uniform standards denied equal protection. This is an equal protection violation only if, after the counting and the resolution of disputes by the judge, similar ballots are treated differently. But that cannot possibly be known until the ballots are all counted. Until then, it was purely speculative as to whether there would be a denial of equal protection.

The ripeness doctrine is intended to prevent federal courts from deciding such speculative claims.[62] The Court has applied the ripeness doctrine in the voting context. For example, in *Texas v. United States*,[63] the Supreme Court refused to rule as to whether the preclearance provision of the Voting Rights Act of 1965 applied to the possible appointment of a magistrate to oversee school districts that failed to meet performance standards.[64] The Court noted that no magistrate had yet been appointed and that the appointment of a magistrate was a last resort to be used only if all other means failed.[65] The Court concluded that the case was not ripe, because it was too

59 *See id.* at 532.

60 *See id.*

61 *Id.* at 541 (Stevens, J., dissenting).

62 *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967).

63 523 U.S. 296 (1998).

64 *See id.* at 302.

65 *See id.* at 300.

speculative whether a magistrate ever would be appointed.[66] Likewise, it was completely speculative as to the nature and extent of inequalities that would exist in the counting that was occurring under Judge Lewis's oversight.[67]

Bush v. Gore was not ripe for an even more basic reason: George W. Bush might well have ended up ahead after the counting. In that event, there obviously would have been no need for the Supreme Court to decide his appeal. The Supreme Court repeatedly has held that a case is not ripe when it is unknown whether the injury will be suffered. For example, in *Reno v. Catholic Social Services*,[68] the Supreme Court held that a challenge to Immigration and Naturalization Service (INS) regulations had to be dismissed on ripeness grounds, because it was too speculative that anyone would be injured by the rules.[69] The Immigration Reform and Control Act of 1986[70] provided that before illegal aliens residing in the United States could apply for legalization, they had to apply for temporary resident status.[71] Temporary resident status required a showing that a person continually resided in the United States since January 1, 1982, and a continuous physical presence since November 6, 1986.[72] The INS adopted many regulations to implement this law.[73]

A class of plaintiffs, Catholic Social Services, challenged some of the INS regulations. The Supreme Court, in an opinion by Justice Souter, held that the case was not ripe for review.[74] The Court said that it was entirely speculative whether any members of the class would be denied legalization because of the regulations.[75] The Court said that the case might be ripe for review if the immigrants took the additional step of applying for legalization.[76]

Bush v. Gore was not ripe for review on December 9, when the stay was issued, or December 11, when the case was heard, or December 12, when it was decided. The case would have been ripe only after all the counting was done if (a) Gore came out ahead in Florida *and* (b) Bush could present evidence of inequalities in how the ballots were

66 *See id.* at 302.
67 *See id.*
68 509 U.S. 43 (1993).
69 *See id.* at 66–67.
70 Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).
71 *See Catholic Soc. Servs.*, 509 U.S. at 46.
72 *See id.*
73 *See id.*
74 *See id.* at 66.
75 *See id.*
76 *See id.*

actually counted. Until and unless these eventualities occurred, the case was not ripe and should have been dismissed.

III. POLITICAL QUESTION DOCTRINE

Yet another distinct justiciability requirement is the political question doctrine. The political question doctrine refers to allegations of constitutional violations that the federal courts will not adjudicate.

The Supreme Court has held that certain allegations of unconstitutional government conduct should not be ruled on by the federal courts even though all of the jurisdictional and other justiciability requirements are met. The Court has said that constitutional interpretation in these areas should be left to the politically accountable branches of government, the President and Congress. In other words, the "political question doctrine" refers to subject matter that the Court deems to be inappropriate for judicial review. Although there is an allegation that the Constitution has been violated, the federal courts refuse to rule and instead dismiss the case, leaving the constitutional question to be resolved in the political process.[77]

The most famous defense of the political question doctrine was made by the late Professor Alexander Bickel.[78] Professor Bickel wrote,

> Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.[79]

Although Bickel wrote these words almost four decades ago, they seem almost prescient when applied to *Bush v. Gore*. Certainly in terms of (a), there is "strangeness of the issue" and its intractability to a principled resolution. Never before in history had the Supreme Court decided a presidential election. The Court said that counting the ballots without uniform standards would be unequal,[80] but no

77 ERWIN CHEMERINSKY, FEDERAL JURISDICTION 143–44 (3d ed. 1999).

78 *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (1962); Alexander M. Bickel, *The Supreme Court, 1960 Term: Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961).

79 BICKEL, *supra* note 78, at 184.

80 *See* Bush v. Gore, 121 S. Ct. 527, 530–31 (2000).

prior decision ever had found that variations among counties in election practices was unconstitutional. Nor did the Court explain why this inequality was impermissible while many other inequalities in Florida, such as differences in voting machines, in ballots, and in treatment of minority voters, were constitutional.

Indeed, the Court seemed aware of the problems with applying equal protection to such variances among counties and with opening the door to challenges to virtually every election because of reliance on local election officials. The per curiam opinion said, "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[81] This certainly confirms Professor Bickel's concerns about the strangeness of the issue and the lack of principles for resolution of it.

Professor Bickel's second factor is even more relevant: "the sheer momentousness of [the issue], which tends to unbalance judicial judgment." If any case fits this description, it surely is *Bush v. Gore.*

Professor Bickel's latter two criteria point to concern over what issues should be decided by unelected judges. Bickel's concern was how involvement in some political issues could compromise the legitimacy of the Court. Although I am critical of Bickel's view and of many of the uses of the political question doctrine,[82] *Bush v. Gore* obviously cost the Supreme Court enormously in terms of its credibility. Over forty-nine million people voted for Al Gore, and undoubtedly virtually all of them regard the Court's decision as a partisan ruling by a Republican majority in favor of the Republican candidate. Few cases, if any, in American history have been more widely perceived as partisan than *Bush v. Gore.*

Bickel's criteria, of course, are not legal rules. The classic statement of the political question doctrine was provided in *Baker v. Carr.*[83] The Court stated:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision al-

81 *Id.* at 532.

82 *See, e.g.,* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 104–05 (1987).

83 369 U.S. 186 (1962).

> ready made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[84]

Many of the *Baker v. Carr* criteria were met. There is a "textual commitment" of determining the electoral votes in a state to Congress. Article II, Section 1 of the Constitution describes the process for Congress to count the votes.[85] After the entire process was done in Florida, there might well have been competing claims as to which slate of the electors should be counted as representing the state. Congress had full authority, and the responsibility, to decide this issue.

There also was a clear lack of judicially discoverable and manageable standards. The ultimate issue before the Supreme Court was what inequalities among counties in the voting process deny equal protection. Many inequalities existed in Florida. Each county designed its own ballot, and errors in Palm Beach County almost certainly caused over 3000 votes for Buchanan in error that were intended for Gore.[86] The Court itself expressed concern with counting the "undervotes," ballots not counted by the machine, but not examining the "overvotes," ballots disqualified for appearing to have chosen more than one candidate.[87] Differences in the voting technology used also caused inequalities. The most frequent type of voting machine used in Florida was an optical scanner, which rejects, on average, four of every 1000 ballots cast.[88] The next most common machine was the punch card system, which rejects, on average, fifteen of every 1000 ballots.[89]

Why is this variance not a denial of equal protection, especially if the differences pointed to by the Supreme Court are sufficient to violate the Constitution? The Supreme Court, of course, provides no answer to this question and no answer seems possible. If variances among counties in a state in holding an election and counting ballots denies equal protection, then the entire election in Florida was unconstitutional and likely the elections in every state.

This, in itself, strongly indicates that the matter was a political question left for Congress to resolve in deciding which slate of electors were to represent Florida in the electoral college. There are no

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84 *Id.* at 217.

85 U.S. CONST. art. II, § 1, cl. 3.

86 Dan Balz, *Resolution Days Away as Bush's Lead Shrinks in Fla.; Gore Mulls Challenges*, WASH. POST, Nov. 10, 2000, at A1, A26. I should disclose that I was co-counsel in this case and argued in the Florida trial court for a new election to remedy the constitutional violations caused by the so-called "butterfly ballot."

87 *See* Bush v. Gore, 121 S. Ct. 527, 531 (2000).

88 *See* Brief of Respondent at 43 n.24, *Bush* (No. 00-949).

89 *See id.*

judicial standards for which differences among counties are unconstitutional and which are permissible.

The response to this is that *Baker v. Carr* found that equal protection challenges to malapportionment were justiciable and not political questions.[90] The argument could be made that *Bush v. Gore* was justiciable because it, too, was an equal protection claim. But *Baker* did not hold that all equal protection challenges to election systems are justiciable; it only held that malapportionment challenges were justiciable.[91]

In other contexts the Court has found that equal protection challenges to the political process were non-justiciable. In *O'Brien v. Brown*,[92] the federal courts were asked to decide what group of delegates should be seated at the 1972 Democratic National Convention.[93] The case reached the Supreme Court three days before the convention began.[94] Illinois delegates, led by Mayor Richard Daley, were excluded on the ground that they were not sufficiently representative of racial minorities.[95] The Daley delegates argued that they were discriminated against and denied equal protection.[96] Also, a group of California delegates pledged to Hubert Humphrey argued that the State's winner-take-all primary was unconstitutional.[97] The court of appeals ruled that the case was not a political question and on the merits held for the California plaintiffs and against the Illinois plaintiffs.[98] The Supreme Court stayed the court of appeals decision. The Court stated,

> In light of the availability of the convention as a forum to review the recommendations of the Credentials Committee, in which process the complaining parties might obtain the relief they have sought from the federal courts, the lack of precedent to support the extraordinary relief granted by the Court of Appeals, and the large public interest in allowing the political processes to function free from judicial supervision, we conclude the judgments of the Court of Appeals must be stayed.[99]

90 *See* Baker v. Carr, 369 U.S. 186, 236–37 (1960).

91 *See id.*

92 409 U.S. 1 (1972).

93 *See id.* at 2.

94 *See id.* at 3.

95 *See id.* at 7–8 (Marshall, J., dissenting).

96 *See id.*

97 *See id.* at 2.

98 *See id.*

99 *Id.* at 5.

There obviously is a difference in the factual setting of *O'Brien v. Brown* as compared to *Bush v. Gore*. Yet, there also are great similarities. Both involved equal protection challenges to aspects of the political process. Both involved a dispute between two slates claiming legitimacy; the competing slates of delegates in *O'Brien* and, assuming Gore came out ahead after the recount, the competing slates of electors in *Bush*. Both were situations where another forum existed to resolve the dispute; the Convention in *O'Brien* and the Congress in *Bush* could decide which slate to seat.

More importantly, the Court in *O'Brien* spoke of "the lack of precedent to support the extraordinary relief."[100] There obviously was no precedent to support the extraordinary ruling by the United States Supreme Court deciding the 2000 presidential election. Furthermore, in *O'Brien*, the Court spoke of "the large public interest in allowing the political processes to function free from judicial supervision."[101] This is exactly why *Bush v. Gore* should have been dismissed as a political question.

IV. WHO DECIDES FLORIDA LAW?

The Supreme Court's per curiam opinion made two arguments. First, counting the uncounted votes without standards violates equal protection.[102] Second, *Florida law* prevents the counting from continuing past December 12.[103] This second point is indispensable to the Court's decision to end the counting. Assuming that there were inequalities in the counting that violated the Constitution, there were two ways to remedy this: count none of the uncounted ballots or count all of the ballots with uniform standards. The latter would involve remanding the case to the Florida Supreme Court for development of standards and for such relief as that court deemed appropriate.

It must be emphasized that the Supreme Court did not hold that federal law prevented the counting from continuing. The only reason for not remanding the case—as Justices Souter and Breyer argued for[104]—was the Court's judgment that Florida law prevented this. In two paragraphs near the end of the per curiam opinion, the Court explained why it stopped the counting.

> The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal elec-

100 *Id.*
101 *Id.*
102 *See* Bush v. Gore, 121 S. Ct. 525, 529–30 (2000).
103 *See id.* at 533.
104 *See id.* at 542–46, 550–58.

> toral process," as provided in 3 U.S.C. § 5. That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.
>
> Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice BREYER's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest under December 18—contemplates action in violation of the Florida election code, and hence could not be part of an "appropriate" remedy authorized by Fla. Stat. § 102.168(8) (2000).[105]

This is recited at length to show that the sole reason the Court gave for ending the counting was based on its interpretation of Florida law. However, no Florida statute stated or implied that the counting had to be done by December 12. The sole authority for the Supreme Court's conclusion was one statement by the Florida Supreme Court.[106]

However, that statement was made in a very different context and when the Florida Supreme Court was not faced with the issue posed by the Supreme Court's ruling. After the Supreme Court decided on December 12 that the counting without standards violated equal protection, the issue was what remedy was appropriate under Florida law: continue the counting past December 12 or end the counting to meet the December 12 deadline. The Supreme Court could not possibly know how the Florida Supreme Court would resolve this issue, because it never had occurred before. Prior Florida decisions emphasized the importance of making sure that every vote is accurately

105 *Id.* at 533 (citations omitted).

106 *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1286 n.17 (Fla. 2000) ("What is a reasonable time required for completion will, in part, depend on whether the election is for a statewide office, for a federal office, or for presidential elections. In the case of the presidential election, the determination of reasonableness must be circumscribed by the provision of 3 U.S.C. § 5, which sets December 12, 2000, as the date for final determination of any state's dispute concerning its elections in order for that determination to be given conclusive effect in Congress.").

counted.[107] The Florida Supreme Court might have relied on this to continue the counting past December 12. Alternatively, the Florida Supreme Court might have ended the counting, treating December 12 as a firm deadline in Florida.

The point is that this was a question of Florida law to be decided by the Florida Supreme Court. It, of course, is clearly established that state supreme courts get the final word as to the interpretation of state law. In *Murdock v. City of Memphis*,[108] in 1875, the Supreme Court held that it could review only questions of federal law and that the decisions of the state's highest court are final on questions of state law.[109] The Court explained that section 25 of the Judiciary Act of 1789[110] was based on a belief that the Supreme Court must be available to ensure state compliance with the United States Constitution, but that there was no indication that Congress intended the Court to oversee state court decisions as to state law matters.[111]

From a federalism perspective, it is inexplicable why the five Justices in the majority—usually the advocates of states' rights on the Court—did not remand the case to the Florida Supreme Court to decide under Florida law whether the counting should continue. The Supreme Court impermissibly usurped the Florida Supreme Court's authority to decide Florida law in this extraordinary case.

How does this relate to justiciability? Of course, even if it was not enough to make the case non-justiciable, it was a key flaw in the Court's decision. But I believe it also shows additional justiciability problems in *Bush v. Gore*. The Supreme Court's holding was to stop the counting, but this was premature until the Florida Supreme Court decided the unresolved issue of Florida law, whether to let the counting continue past December 12.

Moreover, an analogy can be drawn to the political question doctrine. This justiciability doctrine is based on the premise that some issues are best left to others. The interpretation of Florida law was for the Florida Supreme Court to resolve and that determination should have been final in the Supreme Court. In *Baker v. Carr*, the Court spoke of a political question based on "the impossibility of a court's undertaking independent resolution without expressing lack of the

107 *See, e.g., In re* Protest of Election Returns and Absentee Ballots in November 4, 1997 Election for the City of Miami, 707 So. 2d 1170, 1174 (1998).

108 87 U.S. (20 Wall.) 590 (1875).

109 *See id.* at 635–36.

110 Judiciary Act, ch. 20, 1 Stat. 73 (1789).

111 *See Murdock*, 87 U.S. (20 Wall.) at 634–36.

respect due coordinate branches of government."[112] Yet, the Court's deciding rather than remanding in *Bush v. Gore* did exactly this.

CONCLUSION

Bush v. Gore is, by many measures, one of the most important Supreme Court decisions in history. For the first time, the Supreme Court determined who would be the President of the United States. The irony, of course, is that the five Justices in the majority are those who most profess a need for judicial restraint, most seek to protect states' rights, and most have championed restrictive justiciability doctrines. In *Bush v. Gore,* these five Justices abandoned all of these principles.

Not surprisingly, a large segment of the American public—especially the forty-nine million people who voted for Gore—see the decision as a purely partisan ruling. Justice Stevens concluded his dissenting opinion by stating:

> [The] position [of] the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.[113]

112 369 U.S. 186, 217.

113 Bush v. Gore, 121 S. Ct. 525, 542 (2000) (Stevens, J., dissenting).